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No. 82-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN R. LEWIS,

Petitioner,

vs.

CENTRAL PIEDMONT COMMUNITY COLLEGE.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR CENTRAL PIEDMONT COMMUNITY COLLEGE IN OPPOSITION TO PETITION

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

I.

COUNTERSTATEMENT OF THE CASE

Lillian R. Lewis asserted that Central Piedmont Community College in 1975 had denied her a promotion to an Accounting Lab Instructor position because she is black, alleging that subject-matter jurisdiction was conferred by the Civil Rights Act of 1886, 42 U.S.C. §1981, and by 28 U.S.C. §1343(a)(4).

After a nonjury trial, the United States District Court for the Western District of North Carolina entered a Memorandum of Decision concluding -- without finding any facts -- ". . . that plaintiff did suffer discrimination in being denied the accounting lab position for which she applied in August 1975." Thereafter, in obedience to the District Court's Memorandum, Ms. Lewis'

counsel tendered proposed findings and conclusions and a proposed judgment. The College promptly filed specific exceptions to Lewis' proposed findings and conclusions, asserting that in numerous respects her proposals were inconsistent with, or flatly contradicted by, both admitted and uncontroverted facts. The District Court, having made barely noticeable revisions, entered findings and conclusions essentially identical to those Lewis' counsel had proposed. The College gave notice of appeal to the United States Court of Appeals for the Fourth Circuit.

On its appeal, the College argued that the trial court erroneously and improperly had adopted conclusionary proposed findings that were "unsupported by substantial evidence"; that were "flatly contradicted by [admissions] and uncontroverted testimony"; and that were "'clearly erroneous'". The

College asserted that there were no material evidentiary conflicts and that Lewis, as a matter of law, had met neither of her burdens of proving both that she was qualified for the Accounting Lab Instructor job and that the College's "articulated" reasons for its promotion decision were pretextual.

Upon its review of the entire record, the Circuit Court held, in most pertinent part:

> "The critical question in this case is whether, in fact, Lewis was better qualified than Roberts [a white female] for the position of accounting lab instructor. In our opinion, the finding of the lower court that she was is clearly erroneous and, therefore, we must reverse.
>
> . . .
>
> "Proof that the successful applicant was better qualified for the job is not, in and of itself, always sufficient to defeat a claim of racial discrimination. In this case, however, once the College established that Roberts was, in fact, far more qualified than Lewis, there simply was not enough other evidence to support a finding of discriminatory intent" (App. to Petition, pp. 41, 44-45) [Emphasis added].

Accordingly, the Court of Appeals "Reversed" the District Court's judgment and order. Lewis' petition for rehearing was denied, and no judge requested a poll on her suggestion for rehearing en banc (App. to Petition, pp. 48-49).

II.

SUMMARY OF ARGUMENT

As will be shown below, no significant legal issues were presented to or decided by the Circuit Court. The Court of Appeals' decision applies settled authority, clearly enounced by this Court, to a record that includes no material evidentiary conflicts. Upon the College's appeal, no credibility resolutions were necessary, and none were made.

The record did include unrebutted evidence presented by the College and a number of crucial admissions by Ms. Lewis, although the Petition resolutely ignores all such

evidence. Instead, the Petition's presentation of the "facts" incorporates only the unsupported, conclusionary "findings" that were and are the work of Lewis' counsel and decidedly are not a product of the District Court's "weighing and appraising" all of the evidence.

The District Court's uncritical adoption of an advocate's one-sided proposed findings -- that conveniently ignore damaging admissions and unrebutted adverse evidence -- has on other occasions been faulted by the Court of Appeals. The Circuit Court expressly has applied the familiar "clearly erroneous" review standard in this case, in circumstances where "more careful scrutiny" of adopted findings was absolutely justified.

Upon a record without material evidentiary conflicts and upon unsupported adopted findings, it cannot fairly be contended that

the Circuit Court's review of all the evidence and its reversal of the District Court in this case present any "significant question of federal law." No conflict with decisions of other courts can be said to exist in these circumstances. And there otherwise are no "special and important" reasons advising an exercise of this Court's discretion to review this case.

The Petition endeavors to create an illusion of significant legal issues by mischaracterizing and misrepresenting both the Court of Appeals' decision and the evidence that was reviewed on appeal.

Incredibly, a primary contention advanced by the Petition is that the Circuit Court has based its decision solely on an abstract perception of the relative qualifications offered by two candidates for promotion, without any regard to any possibility that the College acted with discriminatory

intent. Such contention borders on dishonesty because the Court of Appeals' opinion specifically recognizes and holds that proof of a successful applicant's superior qualifications ". . . is not, in and of itself, always sufficient to defeat a claim of racial discrimination" (App. to Petition, p. 44).

The Circuit Court opinion clearly reflects the Court's careful review of the entire record, including evidentiary details and, quite properly, including Lewis' admissions and unrebutted evidence presented by the College. This entirely appropriate review culminated in the following rulings: (1) The District Court's finding that Ms. Lewis possessed better qualifications was "clearly erroneous" (App. to Petition, p. 41); (2) Admissions and incontrovertible evidence established ". . . that [the successful applicant] was, in fact, far more qualified than Lewis . . ." (App. to

Petition, p. 44); and (3) Given the successful applicant's clearly superior qualifications, ". . . there simply was not enough other evidence to support a finding of discriminatory intent" (App. to Petition, pp. 44-45) [Emphasis added].

As will be shown in the Argument below, these rulings certainly were within the Circuit Court's jurisdiction and authority and are correct as a matter of law. Lewis' testimony and other incontrovertible evidence conclusively establish that nothing in her training or experience, or within her knowledge, qualified her to teach in the College's Accounting Lab. Lewis' testimony undeniably reflects her complete unfamiliarity with the most basic accounting terminology, principles and procedures applied and practiced even by first-year accounting students in the Lab. Finally, as the Court of Appeals ruled, there is absolutely no

evidentiary basis for any conclusion that the College's reasons for its decision were pretextual, disguising a discriminatory intent.

III.

ARGUMENT

A. The Court of Appeals Applied A Narrow Review Standard

In the Court of Appeals, the College challenged the most crucial of the District Court's adopted findings on the specific grounds that they were "clearly erroneous". The College also specifically argued that such adopted findings were "unsupported by substantial evidence" or were "flatly contradicted by [admissions] and uncontroverted testimony." The Circuit Court explicitly applied that familiar and strict standard of review.

As will be demonstrated in Section B. of this Argument, the Petition presents a

singularly misleading and sometimes absolutely false version of the facts -- a version having its origins in Lewis' one-sided proposed findings. The Circuit Court's opinion properly addresses the most pertinent parts of the entire evidence, and this Brief invites the Court's attention to other material, incontrovertible facts.

The Court of Appeals did not even approach the outer limits of its jurisdiction and authority, consistent with Rule 52(a) of the Federal Rules of Civil Procedure, to set aside clearly erroneous, conclusionary findings adopted by a District Court. Certainly the Circuit Court was not bound to disregard either Lewis' admissions or unrebutted evidence presented by the College.

The College's case on appeal specifically was premised on the commonplace that "if a finding is not supported by

substantial evidence it will be found to be clearly erroneous" (See Wright & Miller, Federal Practice and Procedure: Civil §2585, p. 735 (1971), and cases cited therein). This Court has held, in language pertinent to this case, that a finding may be "clearly erroneous" upon review of "the entire evidence", even if it might be said "there is evidence to support it". United States v. U. S. Gypsum Co., 333 U.S. 364, 395 (1948) [Emphasis added].

Moreover, the Circuit Court explicitly and carefully has confined its review of this case to the well known standards specified by this Court with regard to "the order and allocation of proof" in an employment discrimination case (See App. to Petition, pp. 36-38). The Court of Appeals required only that the District Court's judgment be supported by evidence of any ". . . circumstances which give rise to an

inference of unlawful discrimination" (App. to Petition, p. 38). Upon review of the entire evidence, however, the Circuit Court properly ruled that ". . . once the College established that [the successful applicant] was, in fact, far more qualified than Lewis, there simply was not enough other evidence to support a finding of discriminatory intent" (App. to Petition, pp. 44-45) [Emphasis added]. Again, Lewis' admissions and other incontrovertible evidence compelled this ruling.

It is respectfully contended that this application of the "clearly erroneous" review standard does not suggest any ground or reason for review by this Court. As the College asserted on its appeal and now asserts, there are no material evidentiary conflicts in this case. On the College's appeal, no credibility resolutions were necessary, and none were made.

> "Under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., the trial judge's findings of fact are conclusive unless clearly erroneous, but when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader than where disputed evidence and questions of credibility are involved."
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> Mayo v. Pioneer Bank & Trust Co., 297 F. 2d 392, 395 (5th Cir. 1961)

Furthermore, the District Court in virtually all material respects adopted Lewis' proposed findings. On its appeal, the College submitted that the Court of Appeals should ". . . engage in a more careful analysis of [such] adopted findings than [it] would have had they been authored by the district judge." (See Hagans v. Andrus, 651 F. 2d 622, 626 (9th Cir. 1981).) Beginning in 1977, the Circuit Court has criticised the District Court's wholesale adoption of proposed findings, suggesting that ". . . the District Court prepare its own

opinion." (See White v. Carolina Paper Board Corp., 564 F. 2d 1073, 1082, 1083 (4th Cir. 1977); see also, Holsey v. Armour & Co., 683 F. 2d 864 (4th Cir. 1982).) As the Court of Appeals most recently and pertinently has held:

> "There can be no dispute that the District Court itself, in its 'Memorandum of Decision,' actually made no findings of fact or conclusions of law as those terms are used and construed in Rule 52(a), Fed.R.Civ.P.
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> ...
>
> "We, along with other courts, have on a number of occasions - one as recently as a few months ago in Holsey v. Armour & Company, 683 F. 2d 864 (4th Cir. 1982) - expressed our disapproval of a trial court's practice of announcing its decision and then requesting the prevailing party to prepare findings of fact and conclusions of law which the court adopts almost word-for-word in support of its previously announced decision. The reason for such disapproval is inherent in Rule 52(a), Fed.R.Civ.P., a fair compliance with which 'requires the trial court to find the facts on every material issue, including relevant subsidiary issues, and to "state separately" its conclusions thereon with clarity.' [Citations omitted.]
>
> ...

"All these considerations prompted the Supreme Court in U.S. v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944), to comment that the adoption of 'findings [proposed by one of the parties to the suit and adopted by the trial judge] leave much to be desired in light of this function of the trial court,' under the Rules. This is so because an appellate court will '"feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered" when factual findings were not the product of personal analysis and determination by the trial judge' [Citation omitted].

...

"The adoption by the district court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause per se nor does it mean that the '"clearly erroneous"' rule of Rule 52(a) will not be applied at all, simply because the findings and conclusions were developed by one of the parties and adopted in course by the judge.

...

"When the findings of fact and conclusions of law adopted by the District Court have been given that 'careful scrutiny' by the appellate court that is required under such circumstances and have been 'more narrowly' examined . . . , and when, the reviewing court, on the entire record, 'is left [after such review] with the definite and firm conviction that a mistake has been committed,' United

> States v. Gypsum Co., 333 U.S. 364, 395 (1948), or it is convinced that 'the result in a particular case does not reflect the truth and right of the case,' Armstrong Cork Co. v. World Carpets, Inc., 597 F. 2d 496, 501 (5th Cir. 1979), cert. denied, 444 U.S. 932, it is the duty of the appellate court to reverse the findings and conclusions as clearly erroneous."
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> Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond, F. 2d (4th Cir. 1983), published Slip Opinion in No. 81-1536, pp. 9-10, 11, 13, 14, and 15-16[1]

B. Incontrovertible Evidence and Lewis' Admissions Precluded Any Inference of Intentional Discrimination Because of Race

The following summarization of incontrovertible evidence and of Lewis' admissions demonstrates that the Court of

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[1]The above-quoted case was decided by the same panel that decided this case now before this Court on Petition for Certiorari. Oral arguments in the two cases were presented on the same day, and both appellants urged that the Court of Appeals should "engage in a more careful analysis of ... adopted findings than [it] would have had they been authored by the district judge."

Appeals' decision is correct as a matter of law.

According to Lewis' admissions, the College's Accounting Lab was utilized by students in all its accounting courses, including Cost Accounting, Auditing, Income Taxation and Advanced Accounting. Most significantly, Lewis further admitted that the College's Accounting Department Head "explained" the Accounting Lab Instructor "job description" to her and specified that if the students "had questions about what was going on [the instructor] was to have been able to help them." Accordingly, Lewis also admitted that she understood "there was to be some instructor assistance where [the students] needed it." Upon Lewis' foregoing admissions, detailed testimony by College witnesses merely corroborated and amplified the facts that students in all the College's

accounting courses utilized the Lab and that the Lab Instructor taught and assisted them.

Six persons applied for the Accounting Lab Instructor position, two of whom already were employed by the College in other positions. A white female, Ms. Roberts, was completing her accounting studies at the College and was employed by the College as a parttime Accounting Lab Instructor when she applied for the fulltime position. Ms. Lewis, who at the time was employed as a cashier in the College's business office, also applied for the job.

The Petition asserts that a College ". . . policy gave [Lewis] a preference over non-employees in filling job vacancies" and that, in effect, Roberts was a "non-employee" because she had been employed as a typist ". . . in connection with a student work-study program, which did not qualify her as an employee entitled to the

preference" (Petition, p. 9). This contention ignores the fact that Roberts also was a parttime Accounting Lab Instructor. Furthermore, the District Court decidedly did not find or conclude that the College was required by its policy to hire Lewis as the Accounting Lab Instructor, even though the District Court did adopt the erroneous finding that Lewis was qualified for the job.

The College's Accounting Department Head testified without contradiction that the job required teaching accounting students a wide variety of accounting tasks ranging ". . . from very simple things like making journal entries in all journals, . . . using ledgers, general ledgers, subsidiary ledgers, special ledgers [and] preparation of financial statements." Even students in the College's "basic principles courses" had to "learn" and "know how" to prepare "journal entries or closing

entries", "to prepare financial statements" including "balance sheets and income statements", to "reconcile a ledger", to accomplish "the closing of a set of books" and to make "closing entries".

Lewis had completed only two basic and two intermediate accounting courses some eleven years prior to the promotion decision in question. Her general academic performance was poor; her class rank was 153 in a class of 170; and she was on "probation" for "poor scholarship" during her final semester. Lewis admitted that she had no other "training [n]or any experience in accounting." Specifically, Lewis never took courses in Cost Accounting, Auditing, Income Taxation or Advanced Accounting, and admitted that she would have been required to "assist" the College's accounting students who were taking these courses. Her only job experience was as a "key punch operator" for

another employer and as a "cashier" for the College.

Prior to her employment by the College, Lewis had never worked with a general ledger, had never made any journal entries and had never applied any of the basic accounting instruction she had received. As a cashier at the College, she had never worked with a general ledger, had never "balanced or reconciled general ledgers", had never made "journal entries", had never "posted general ledgers" and did not even know what "closing statements" were. In fact, she had never seen a complete set of accounting books.

Even after a 1979 promotion, Lewis did no general ledger work and made journal entries only when her supervisor gave her explicit instructions as to the accounts she should debit and credit. Lewis admitted that the College trained her to perform the

duties of the job into which she was promoted in 1979 and that such duties are not taught in any accounting course.

Aside from her admitted lack of on-the-job experience in applying even basic accounting terminology and procedures, Lewis' testimony demonstrated a shocking lack of knowledge concerning the most fundamental accounting principles. Lewis was unable to identify even broad, general categories of general ledger accounts, such as asset, liability, expense or income accounts. She could not describe a general ledger or a journal entry and did not know that journal entries are required in order to close a general ledger. The term "trial balance" had little meaning to Lewis. Her testimony revealed that she did not understand even the most elementary principles of double-entry accounting.

Because of Lewis' obviously limited background in and knowledge of accounting principles and procedures, Ms. Roberts was selected as the more qualified candidate for the Accounting Lab Instructor position. Roberts already had served as a parttime Accounting Lab Instructor and, as the Accounting Department Head testified:

> ". . . Roberts was selected because she had the best academic credentials. . . . She had just recently been through our program and been through the courses that were offered on [our] campus. She would be working with students who would be going through those same courses, and she had also been through courses at all levels in which students would be using the lab. . . . We were looking for a person who had the academic qualifications to work with those students, to be able to assist them in solving their accounting problems and completing their classroom assignments. . . ."

Roberts' transcript revealed that she had completed eight accounting courses; that she had made six "A's" and one "B" in the seven courses for which she received grades;

and that she had completed the Income Tax, Auditing, Advanced Accounting and Cost Accounting courses that Lewis had never taken.

The foregoing summarization of the facts presents only admitted and incontrovertible record evidence. The Petition, however, resolutely ignores Lewis' admissions and the incontrovertible evidence pertaining to the relative qualifications of the candidates for promotion. The Petition merely restates the unsupported and conclusionary adopted findings to the effect that Lewis' work experience qualified her for the position. The entire evidence, however, devastates any assertion that Lewis' work experience or accounting knowledge qualified her to teach accounting students anything that related to the courses they were taking. Such restated adopted findings hardly overcome the overwhelming evidence that

Lewis was not even minimally qualified for the Accounting Lab Instructor position.

The Petition also restates the adopted findings in an attempt to denigrate Roberts' obviously superior qualifications. It is indisputable that Roberts had excelled in all of the College's intermediate and advanced accounting courses and had completed with distinction all of the accounting lab problems that the College's students would be encountering in the Lab. She earned her Associate Degree in Accounting before she assumed the duties of the Lab position. By contrast, more than three years after the Accounting Lab opening, Lewis registered for, and subsequently completed, the College's first introductory accounting course because, as Lewis testified, "if I started there with the basic course and got the foundation . . . I could go from there."

Roberts also had experience in putting her accounting courses to the exact "practical application" required in the Lab -- she had completed all the problems assigned in the Lab and all the courses to which the Lab was an "adjunct", both with outstanding results. Furthermore, as the College's part-time Accounting Lab Instructor, she had directly applicable "work experience".

There was a single, immaterial evidentiary conflict in this case. Disputed evidence tended to show that the Accounting Department Head made an initial recommendation, never acted upon, that Lewis be selected for the Accounting Lab Instructor position. On appeal, however, it was totally unnecessary for the College to quarrel with the District Court's adopted findings upon this disputed evidence. This was because of the undisputed and incontrovertible testimony that the Department Head, who

allegedly made the recommendation, "was told" the College's "anti-nepotism" policy precluded the selection of Roberts, the preferred and more qualified candidate, because her sister was employed by the College.

Exactly contrary to representations set forth in the Petition, the Department Head testified without contradiction that he "was told [Roberts] could not be considered" because of the policy. Indeed, one of Lewis' own witnesses testified that "[i]f I recall correctly, he thought the [anti-]nepotism policy was still in effect and that [Roberts] could not be hired for that reason." Additionally, another of Lewis' own witnesses testified that at the time the Department Head allegedly wrote the recommendation, Roberts had not been considered for the job, and there had been no comparison of the applicants' qualifications.

There is absolutely no evidence that anyone ever considered Lewis to be even as qualified as Roberts. At trial, Lewis admitted that she did not even claim she was more qualified than Roberts. Lewis also admitted that the Department Head, who allegedly later made a recommendation of Lewis, had advised her during her interview for the position that ". . . the work [she] had been doing there on campus in the Business Office would have been different from [the] work that was to be done in the Accounting Lab." Even if the alleged recommendation of Lewis did occur, such recommendation could not establish that Lewis was as qualified as Roberts.

The entire evidence conclusively demonstrates that nothing in Lewis' training or experience, or within her knowledge, established her qualifications to teach in the Accounting Lab. The Circuit Court certainly

was not required to ignore Lewis' total unfamiliarity with and inexperience in the most basic accounting terminology, principles and procedures applied and practiced even by first-year accounting students in the Lab.

Conceding that the College had specified "an Associate Degree in Accounting or work experience equivalent" as minimal qualifications for the Lab Instructor position, the Petition argues that Lewis' work experience qualified her for the position and that the alleged recommendation proved her qualifications. Incontrovertible evidence indisputably establishes that Lewis had no experience with, and could not have given instruction or assistance in, even the most elementary accounting principles and procedures. Her own testimony devastates the assertion that she proved the qualifications element of her case.

Furthermore, incontrovertible record evidence clearly shows that the successful candidate for the promotion, Roberts, possessed the academic credentials and current, advanced knowledge of accounting principles and theories that the College reasonably concluded would enable her to instruct and assist accounting students taking all the College's accounting courses.

The Petition refers to testimony that three College employees, one of whom was black, had been placed in other jobs and had been permitted to complete the studies necessary to fulfill all the educational requirements for such jobs. There is, however, no evidence that fully qualified candidates had applied or were available for these other positions. Furthermore, Lewis admitted that she could not have completed twelve or more hours of accounting courses and have performed the Lab Instructor's duties.

The Petition misrepresents the incontrovertible evidence relative to the written recommendations that Roberts be selected for the position. The initial written recommendation made by the Department Head was as follows:

> "[Roberts] is a graduate of the Accounting Department at the College. Her grades are excellent and her former instructors highly recommend her. She is totally familiar with our instructional programs, and fully committed to our methods of instruction."

The Petition ignores this initial recommendation of Roberts as the superior candidate, which specified undeniably proper and nondiscriminatory reasons. Instead, the Petition seeks to focus attention only upon a subsequent "translation" of this initial recommendation. Part of the subsequent "translation" of the initial recommendation was considered improper by the College's Personnel Director, who subsequently

accepted the reasons set forth in the initial recommendation.

After Roberts had been selected for the position rather than Lewis, Lewis "asked for a hearing" with the Personnel Director regarding the reasons for Roberts' selection. Lewis' testimony establishes that the Personnel Director was satisfied a proper decision had been made. Lewis admittedly "believed" the Personnel Director's explanation that the selection had been based upon qualifications.

It is absolutely indisputable that the College did "articulate" nondiscriminatory reasons for its promotion decision. Upon the entire evidence, summarized above, the Court of Appeals properly reversed the District Court's unsupported conclusion that the College's articulated reasons were pretextual.

Lewis' own admissions conclusively establish that "her non-academic . . . background" (that is, her work experience) decidedly did not expose her to even the most basic accounting terminology, principles or procedures. There is absolutely no record evidence that white males hired by the College in 1968 and 1970 were "less qualified" than Lewis - this adopted conclusion was a naked assertion by Lewis' counsel. The Department Head's initial "explanation" for his recommendation of Roberts was not "prepared . . . after the fact" -- the Personnel Director merely requested clarification of a rather nebulous "translation" of the initial recommendation. The clarification given the Personnel Director set forth the reasons incorporated in the initial recommendation rather than tailoring its content "to whatever the personnel officer felt was appropriate." Even if the Department Head

did draft a recommendation of Lewis -- because he had been told Roberts could not be considered for the position -- there is absolutely no record evidence that anyone ever thought Lewis was "the best qualified applicant". The Department Head at all times considered Roberts to be the better-qualified candidate, and he selected her after it was determined that the College's "anti-nepotism" policy was not an obstacle. Upon this incontrovertible evidence, the Court of Appeals properly concluded there is absolutely no evidentiary basis for a conclusion that the College's reasons for its decision were pretextual, disguising a discriminatory intent.

IV.

CONCLUSION

Upon all of the foregoing, Central Piedmont Community College earnestly

contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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